IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO MOTION TO INTERVENE BY CHEROKEE NATION (DKT. NO. 2564) & STATE'S MOTION FOR CONTINUANCE OF TRIAL (DKT. NO. 2573)

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The *Motion to Intervene by Cherokee Nation*, Dkt. No. 2564 (Sept. 2, 2009), and the State's related *Motion for Continuance of Trial*, Dkt. No. 2573 (Sept. 3, 2009), should be denied for several reasons.

First, these motions are untimely. This case was filed on June 13, 2005. *See* Dkt. Nos. 1-2. After more than four-and-a-half years of intense litigation, this case is now on the very eve of trial. In fact, when the Court hears argument on these motions, the trial will be set to begin in *three business days*. Federal Rule of Civil Procedure 24(a) forbids such untimely attempts to intervene in a case. "The purpose of the [timeliness] requirement is designed to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal. As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene." *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000).

Second, the State and the Cherokee Nation have long known about the Cherokee Nation's asserted interests in the Illinois River Watershed ("IRW") but they did not move to intervene or continue the trial until the night before the final pretrial conference. By 2005, both the State and the Cherokee Nation had actual knowledge that the State's lawsuit asserted ownership and trusteeship over the same natural resources claimed by the Cherokee Nation. In March 2005, the Chief of the Cherokee Nation wrote to Attorney General Edmonson about the lawsuit. Similarly, in 2005 representatives of some Defendants went to Tahlequah and met with the Chief of the Cherokee Nation and the Nation's Attorney General to make them aware of the conflict between the State's claims and the Nation's asserted interests. The Cherokee Nation indicated at that time that it did not want to be involved in the lawsuit because the Nation did not want to risk a court ruling on the merits of its asserted interests in the IRW. Nevertheless, Defendants raised this issue in their Answers and pursued it through discovery and a Rule 19 motion filed in October

2008 (eleven months ago). Despite all of these efforts, for the past four-and-a-half years the State litigated this case in the absence of the Cherokee Nation. At the same time, the Cherokee Nation made a deliberate decision not intervene in this action.

Third and perhaps most important, as the case currently stands there is no prejudice to denying the *Motion to Intervene* and the *Motion for Continuance*, but there is great prejudice in granting those motions. There is no prejudice to the Cherokee Nation in denying the motions because the Cherokee Nation's claims will not be impaired and it may file a separate lawsuit on those claims, if it wishes. The Court carefully separated the claims impacting the Cherokee Nation's interests so that the Nation's potential claims will not be prejudiced by the upcoming trial. The Cherokee Nation's proposed complaint recognizes as much. That complaint seeks only to re-insert into this case the very claims that the Court has carved out of the pending trial. *See* Intervenor's Complaint, Dkt. No. 2564-2 (asserting claims for damages under CERCLA and federal common law). Because the Nation's claims are no longer part of this trial, the Nation's interests in its separate claims will not be impacted by the trial. In contrast, the parties and the Court will suffer significant prejudice if the motion to intervene is allowed to fundamentally change the nature of this case at the last second.

BACKGROUND

For four-and-a-half years the Cherokee Nation and the State of Oklahoma have known that they both assert competing claims to the natural resources of the IRW. Over that same time, the Cherokee Nation and the State of Oklahoma have both known that the State put these competing claims at issue by seeking damages for alleged injuries to those natural resources. Yet, for more than four years the State of Oklahoma has denied the Cherokee Nation's interests in the IRW while the Cherokee Nation has intentionally avoided involvement in this case. This course of action prevents the State and the Nation from seeking to postpone the trial on the

State's claims.

The conflict between the State and Cherokee Nation is not new. In April and August, 2004, Chad Smith, the Chief of the Cherokee Nation, wrote to various federal and Oklahoma officials asserting that the Cherokee Nation owns the waters in the IRW, and has since before Oklahoma statehood. *See* Ex. A.

The State and Cherokee Nation also knew that the Nation's claim to the IRW's natural resources applied to this case. On March 14, 2005 (four years and five months ago), Chief Smith wrote to Attorney General Edmondson about the State's proposed lawsuit regarding the use of poultry litter in the IRW. *See* Ex. B. Chief Smith noted that he had met with a number of poultry growers about the State's lawsuit, and offered to host discussions in an attempt to prevent this litigation.

The State filed its original complaint in this action on June 13, 2005. *See* Complaint, Dkt. Nos. 1-2.[1] The State subsequently filed amended complaints on August 19, 2005 and July 16, 2007. *See* Dkt. Nos. 18-1; 1215. Each of these complaints alleged that the State of Oklahoma is the exclusive owner and trustee of the natural resources in the IRW and asserted claims for damages and injunctive relief based on CERCLA and federal common law, among other theories. *See, e.g.*, Dkt. No. 18-1 at ¶5 ("The State of Oklahoma, without limitation, has an interest in the beds of navigable rivers to their high water mark, as well as all waters running in definite streams. Additionally, the State of Oklahoma holds all natural resources, including the

[1] In violation of Federal Rule of Civil Procedure 19(c), each of the State's original and amended complaints "failed to comply with [their] obligation to explain in its pleadings why it did not join" the Cherokee Nation, "who, on the face of the pleadings, have an obvious interest in this matter." *Televisa, S.A. de C.V. v. Koch Lorber Films*, 382 F. Supp. 2d 631, 634 (S.D.N.Y. 2005). Yet, the State subsequently admitted that the Cherokee Nation "has substantial interests" in the natural resources in question. *See* Dkt. No. 2108 Ex. A at 1 (May 20, 2009). Given the State's knowing omission of this fact, "plaintiff[s] must suffer an adverse inference on this score." *Televisa*, 382 F. Supp. 2d at 634.

biota, land, air and waters located within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public."); ¶¶78-79 (asserting claims for CERCLA cost recovery and natural resource damages); ¶¶109-118 (asserting a claim under federal common law).

In their answers to the State's complaints filed in 2005 and 2007, Defendants raised the issue of whether the State's claims involved the interests of third parties in the IRW's natural resources, including the Cherokee Nation. *See, e.g.*, Dkt. No. 73 at 27 (Oct. 3, 2005) ("The Complaint is barred by Plaintiffs' failure to join indispensable parties."); Dkt. No. 78 at 3 (October 3, 2005) ("Peterson denies that the State has an interest in the waters and natural resources located within the IRW, which stands in derogation of the sovereign rights of certain Indian Tribes including, but not limited to, the Cherokee Nation."); Dkt. No. 1236 at 3 (Aug. 15, 2007) (same).

In late 2005, counsel for the Tyson Defendants went to Tahlequah and met with Chief Smith and representatives of the Cherokee Nation to discuss the fact that the State's complaint directly implicated the Cherokee Nation's asserted interests in lands, waters, and biota within the Oklahoma portion of the IRW. This was one of numerous conversations between representatives of Defendants and the Nation regarding the conflict between the State's allegations and the Cherokee Nation's claims. However, the Cherokee Nation declined to assert its interests in this case and asked Defendants not to pursue a course of action that would put the validity of the Cherokee Nation's claims before this Court. Accordingly, in the face of the State's claim of exclusive ownership, Defendants were left to research on their own the extent of the Cherokee Nation's interest in the IRW and the impact, if any, on the State's allegations.

Despite its repeated assertions to the contrary, on February 19, 2008, the State acknowledged under oath that the Cherokee Nation claimed a competing interest in the natural resources of the IRW. During his testimony on the State's motion for a preliminary injunction,

Plaintiff Miles Tolbert testified that "there are some members of the Cherokee Nation who think they have a claim to the water." Testimony of Plaintiff Miles Tolbert, Preliminary Injunction Hearing Tr. at 153:17-23 (Ex. C).

On June 26, 2008, Defendant Tyson Foods, Inc. served discovery requests on the State seeking materials relating to the Cherokee Nation's claim to the IRW's natural resources. The State responded on August 11, 2008, providing several documents that demonstrated a longstanding dispute between the Cherokee Nation and the State over natural resources. *See* Ex. D.

On October 27, 2008, counsel for the Tyson Defendants again met with Chief Smith and Diane Hammons, General Counsel of the Cherokee Nation, to inform them that Defendants had researched the Cherokee Nation's asserted interests in the IRW and the effect of those interests on the State's claims. Defendants informed Chief Smith and General Hammons that they would be filing a Rule 19 motion. Defendants provided General Hammons with a copy of the Rule 19 motion and sought her comments before filing. *See* Ex. E.

Several days later, on October 31, 2008 (nearly 10 months ago), Defendants filed their *Motion to Dismiss for Failure to Join the Cherokee Nation as a Required Party or, In the Alternative, Motion for Judgment as a Matter of Law Based on Lack of Standing*, Dkt. Nos. 1788 ("Rule 19 motion"), requesting that the Court dismiss certain of Plaintiffs' claims for failure to join the Cherokee Nation as a required party to this litigation. In response, on November 3, 2008, the Cherokee Nation issued a press release stating that "[t]he water rights of the Cherokee Nation came into existence long before the State of Oklahoma or the United States. From the time the Nation exchanged with the federal government all its land in the east with the land in northeastern Oklahoma, water rights have remained intact." General Hammons provided a copy of the statement to Defendants along with a note thanking Defendants for keeping the Nation

informed about the Rule 19 motion. *See* Ex.F.

On November 7, 2008, the State sought an extension of time to respond to the Rule 19 motion, which this Court granted. *See* Dkt Nos. 1795, 1800. However, on December 15, 2008, the State filed two responses to the Rule 19 motion. *See* Dkt. Nos. 1810, 1811. The State's briefs continued to assert that the State of Oklahoma—not the Cherokee Nation—is the exclusive sovereign owner and trustee of the IRW's natural resources. *See id.*. Defendants provided General Hammons with copies of these responses the next day, December 16, 2008, to keep the Nation informed of the State's continuing assertions of rights in conflict with the Nation's claims. *See*. Ex. G.

Because the State filed two responses to the Rule 19 motion, the Court struck the State's briefs but granted the State additional time to file a single consolidated response. *See* Dkt. No. 1817. Accordingly, the State filed its consolidated response on January 8, 2009. Dkt. No. 1822. In this brief the State once again accused the Defendants of polluting the natural resources of the IRW and forcefully contested the Cherokee Nation's interests in those resources. *See id.* at 2-10 (denying that the Cherokee exercise ownership or sovereignty over waters, lands, river beds, or biota in the IRW).

Yet again, the Cherokee Nation took no action to intervene in this case. Instead, on May 20, 2009 (nearly five months after Defendants filed the Rule 19 motion), Plaintiffs filed a notice with the Court attaching an agreement between the Attorney General for the Cherokee Nation and the Oklahoma Attorney General. This agreement purported to retroactively assign the Cherokee Nation's claims in this case to Plaintiffs. *See* Dkt. No. 2108 Ex. A (May 20, 2009). Defendants filed a notice addressing the legal deficiencies in this purported agreement between the State and the Cherokee Nation, and sought leave to file a brief on these issues. *See* Dkt. Nos. 2110, 2244, 2312. This purported agreement has since been invalidated due to a myriad of

fundamental flaws, including the fact that Oklahoma law flatly prohibits the assignment of such claims, and the fact that the signatories failed to comply with a variety of mandatory requirements for the execution of an such agreement under federal, state and Tribal law. *See* Dkt. No. 2362 at 4-7.[2]

On July 2, 2009, the Court heard oral argument on the Rule 19 motion, with counsel for the State and the Cherokee Nation present. At that argument the State's allegations against Defendants and their impact on the Cherokee Nation's interests were discussed at length.

On July 22, 2009, the Court granted Defendants' Rule 19 Motion, in part, holding that the Cherokee Nation is a required and indispensable party to certain of the State's claims. *See* Dkt. No. 2362 at 15-16, 21, 23 (July 22, 2009) ("Order"). In the Order, the Court recognized that the State's "claims for money damages absent the Cherokee Nation ignores the Nation's sovereign right to manage [its] natural resources … and seek redress for pollution thereto," Order at 13, and held that "[i]n light of [these] factors …, "as well as the State's and the Nation's disparate views relating to jurisdiction and ownership of lands and natural resources in Northeastern Oklahoma, this court is unpersuaded that the State can adequately protect the absent tribe's interests," *id.* at 14.

In its Order, the Court carefully crafted its relief to avoid prejudice to the State or the Cherokee Nation. The Court specifically dismissed those portions of the State's case which the Court concluded impacted the Cherokee Nation's competing interests, while preserving those claims which the Court concluded the State could pursue alone. The Court stated that:

[2] Even after entering into this purportedly binding agreement, the Cherokee Nation continued to work with both sides in order to obtain the decision they preferred without the risk associated with joining the case and being bound by the result. For example, in advance of oral argument on the Rule 19 motion, counsel for the Cherokee Nation provided defense counsel with memoranda and analysis detailing the nature of the Cherokee Nation's interests in the natural resources within the IRW—to the detriment of the State. *See* Ex. H.

> The Cherokee Nation is a required party under Rule 19 with respect to the State's claims for damages. Joinder of the Cherokee Nation is not feasible based on the Nation's status as a dependent sovereign. The Cherokee Nation is an indispensable party and, pursuant to Rule 19(b), plaintiff's claims for damages should not, in equity and good conscience, be allowed to proceed among the existing parties. The Cherokee Nation is not a required party to the State's claims for violation of state environmental and agricultural regulations. Movants do not seek dismissal of plaintiff's claims for injunctive relief. Therefore, defendants' Motion to Dismiss [Doc. No. 1788] is granted with respect to Counts 1, 2 and 10 and the claims for damages asserted in Counts 4, 5 and 6. The motion is denied with respect to Counts 3, 7, and 8 and claims for injunctive relief asserted in Counts 4, 5 and 6.

Id. at 22-23.

Even with the Court's careful ruling preserving the interests of both the Cherokee Nation and the State, the battle regarding the Cherokee Nation's claims in the IRW was not over. The State filed a motion to reconsider on August 3, 2009 and a reply on that motion on August 12, 2009. *See* Dkt. Nos. 2392, 2456. The motion to reconsider was subject to extensive oral argument, with the State once again denying the Cherokee Nation's asserted interests in the IRW.

Even before the Rule 19 motion was filed, the Court made clear that the trial in this matter would begin on September 21, 2009—just a few days from today. *See* Dkt. No. 2049. In fact, as early as November 15, 2007 the Court set the trial in this matter for September 2009. *See* Dkt. No. 1376. At Plaintiffs' urging, the Court has steadfastly held to that trial date and has rejected any changes to the scheduling order that could endanger the trial date. *See id.*; Dkt. Nos. 1376 (establishing trial date); 1459 (setting schedule that preserved the trial date); 2326 (denying motion to continue trial date). In so doing, the Court has emphasized that "[m]odifications to the scheduling order, which has been relied upon by counsel since its entry on November 15, 2007, should not be made without clear benefit to all parties." Dkt. #1459, at 2. Under the Court's

scheduling order, the parties have completed nearly every step of the litigation, other than trial itself, including fact and expert discovery, briefing on motions to dismiss and summary judgment, and a myriad of pre-trial motions and trial-related briefs.

On September 2, 2009, the Cherokee Nation filed the *Motion to Intervene*, Dkt. No. 2564, requesting intervention under Federal Rule of Civil Procedure 24(a). Despite all of these proceedings, the Cherokee Nation asserted that its motion was timely because the Cherokee Nation had no notice that this case raised issues relating to the Nation's asserted interests in the IRW until this Court's Order was entered on July 22, 2009. *See id*. at 6 ("By finding that the Nation was an indispensable party, this Court put the Nation on notice that it was proper party to this litigation."). As discussed above, this was the same Order in which the Court also dismissed those claims as to which the Nation was an indispensable party, leaving for trial only those claims for which the Nation's presence was *not* required. The Nation's *Motion to Intervene* does not attempt to address the history of proceedings discussed above.

Plaintiffs subsequently filed the *State's Motion for Continuance of Trial*, Dkt. No. 2573 at 1 (Sept. 3, 2009), seeking a "continuance of the trial … for 120 days, or until January 2010, in the event the Cherokee Nation is allowed to intervene."

LEGAL STANDARD

Under Federal Rule of Civil Procedure 24(a) "an applicant may intervene as a matter of right if (1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by existing parties." *In re SEC v. Broadbent*, 296 Fed. App'x. 637, 638-639 (10th Cir. 2008); *See also Ute Distrib. Corp. v.*

Norton, 43 Fed. App'x 272, 275 (10th Cir. 2002); *see* Fed. R. Civ. P. 24(a).[3] It is insufficient to show that only one or many of these elements are met. Rather, the movant bears the burden to prove that all four requirements have been satisfied—including the timeliness of the application to intervene—before intervention may be granted. *See In re SEC*, 296 Fed. App'x. at 638-639; *Ute Distrib.*, 43 Fed. App'x. at 275; *United States v. Blaine County*, 37 Fed. App'x. 276, 278 (9th Cir. 2002); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 490 (S.D.N.Y. 1998).

As to the first factor, the Tenth Circuit has clarified that "[t]he timeliness of a motion to intervene is assessed in light of all the circumstances, including [1] the length of time since the applicant knew of his interest in the case, [2] prejudice to the existing parties, [3] prejudice to the applicant, and [4] the existence of any unusual circumstances." *In re SEC*, 296 Fed. App'x. at 639 (quotation omitted); *Ute Distrib. Corp.*, 43 Fed. App'x. at 275. Denial of an application to intervene is required where the application is not timely filed. *See Blaine County*, 37 Fed. App'x. at 278 ("We need not address the other elements of Fed. R. Civ. P. 24(a)(2), as timeliness is the threshold requirement for intervention as of right." (internal quotations omitted)).

The *Motion to Intervene* asserts that the Cherokee Nation should be granted leave to intervene as of right because the Court previously concluded that the Nation is a necessary and indispensable party under Rule 19. This is incorrect. The Tenth Circuit has rejected this argument, and has held that a party who would otherwise be necessary and indispensable under

[3] In full, Rule 24(a) states:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).

Rule 19 must nevertheless satisfy Rule 24's four elements, including its timeliness requirement. *See Ute Distrib. Corp. v. Norton*, 43 Fed. App'x. at 280 ("Even if a Rule 19 analysis may be applied to a motion for intervention of right, the Timpanogos Tribe must still demonstrate that it meets the four elements of Rule 24(a)(2).").

ARGUMENT

I. The Cherokee Nation's Motion to Intervene is Not Timely

In determining whether a motion to intervene is "timely" under Rule 24(a), the Court must assess "all the circumstances, including [1] the length of time since the applicant knew of his interest in the case, [2] prejudice to the existing parties, [3] prejudice to the applicant, and [4] the existence of any unusual circumstances." *In re SEC*, 296 Fed. App'x. at 639 (internal quotation omitted); *See also Ute Distrib. Corp.*, 43 Fed. App'x. at 275 (same). Each of these factors supports denial of the Cherokee Nation's motion to intervene as untimely.

A. The Cherokee Nation knew of its interest in this case from the outset of this litigation, but chose not to intervene

The Cherokee Nation's *Motion to Intervene* admits that the Nation "undoubtedly was aware of the litigation and knew that it had an interest in the IRW" before the Court's Rule 19 Order was entered in July 2009. Mot. at 5. This admission alone is sufficient to deny the motion to intervene. In fact, courts routinely deny such motions where a party knows or should have known of its interest in the subject matter of a lawsuit, but the party waits until the case is several years old, discovery is closed, the deadline for dispositive motions has passed, or the trial is approaching. *See, e.g., Creusere v. Bd. of Educ. of the City Sch. Dist. of Cincinnati*, 88 Fed. Appx. 813, 825 (6th Cir. 2003) (denying intervention where case was over three years old and trial was scheduled in about a month); *Caterino v. Barry*, 922 F.2d 37, 39-43 (1st Cir. 1990) (affirming denial of intervention sought "just over three months before the scheduled trial date,

and months after the close of discovery"); *Jones v. Richter*, 2001 U.S. Dist. LEXIS 4228, *4-12 (W.D.N.Y. Apr. 3, 2001) (denying motion to intervene filed after "[d]iscovery had closed in this case and it had already been scheduled for trial."). All of these factors are present here.

Moreover, although the Cherokee Nation's admission that it has long been "aware of the litigation and knew that it had an interest in the IRW" is true, the admission understates the extent of the Cherokee Nation's knowledge. As discussed above, from the outset of this litigation the Cherokee Nation has had actual knowledge that the State of Oklahoma's lawsuit impaired and impeded the Cherokee Nation's claim to be the sole sovereign, owner and trustee of the natural resources in the Oklahoma portion of the IRW. *See supra* at 2-9. Chief Smith wrote to General Edmondson about the case before its was even filed, demonstrating an acute awareness of the claims at issue and their potential impact on the Cherokee who make their living as poultry growers. This active knowledge continued throughout the case. As noted above, Defendants consulted the Cherokee Nation when they filed the Rule 19 motion in October, 2008. The Cherokee Nation was provided copies of the briefing and arguments about their interests throughout the end of 2008 and into 2009. The Cherokee Nation even went so far as to consult with Defendants on the arguments to present in support of their Rule 19 motion, while at the same time attempting to enter into an agreement with the State to assign the Nation's rights in this litigation.

The *Motion to Intervene* provides no explanation why the Cherokee Nation chose not to intervene when the case was filed in 2005, nor why the Nation did not file a motion in 2008 when the Defendants raised the Rule 19 issue for decision. The motion is also silent about why the Cherokee Nation did not intervene in May 2009, when it negotiated an assignment with the State. Surely at this time the Nation knew of its potential interests as the State sought to

negotiate an assignment of those interests. Yet the Cherokee Nation stayed out of the case and urged both parties toward a ruling on the Rule 19 issue. This course of action provided the greatest chance that the Cherokee Nation's interests would be recognized by the Court without risking a binding precedent. As long as the Cherokee Nation did not join the suit, they could not be bound by the Court's legal conclusions about the extent of their interests in the IRW. Accordingly, at each stage of the litigation the Nation made a tactical decision not to intervene, but rather to let the proceedings unfold.

In light of the facts of this case, the *Motion to Intervene* is incorrect in stating that "[i]t was not until July 22, 2009 when the Court's [sic] ruled on the Defendant's motion that the Nation was aware that it was necessary for it to seek intervention," and only then "was the "Nation on notice that it was proper party to this litigation." Mot. at 5.[4] The Court's July 22, 2009 Order did nothing to alter the prior circumstances, and instead merely affirmed the previously known fact that the Cherokee Nation's interests were at issue and not protected by the State's conflicting claims. The Cherokee Nation's prior knowledge prohibits the Cherokee Nation from intervening now, mere days before trial, and changing the entire scope of the case.

The *Motion to Intervene* argues that the time for the Cherokee Nation to intervene did not begin to run until the Court's July 22 Order validated the Nation's long-asserted interests in the IRW. *See* Mot. at 5. But this argument misapprehends the intervention caselaw. To meet Rule 24's timeliness requirement, an intervenor must file a motion to intervene at the time "the applicant knew of his interest in the case." *In re SEC*, 296 Fed. App'x. at 639; *See also Ute Distrib. Corp.*, 43 Fed. App'x. at 275. An intervenor may not sit on his rights until the case validates his rights or plays out in a way that is favorable. *Creusere*, 88 Fed. Appx. at 825 ("the

[4] Even if this were true (it is not), it does nothing to justify the Cherokee Nation's inexcusable decision to wait an additional six weeks after the Court's ruling before filing the motion to intervene.

[intervenor] should have known of its interest from the beginning of the litigation, and although its interest is heightened because of [a recent ruling in the case], its interest was not new. Therefore, the [intervenor] could have intervened as soon as this case was filed, but as it did not, its motion was too late."). Any other rule would invite potential intervenors to wreak havoc on trial proceedings as they patiently survey the litigation awaiting a favorable moment to jump in.

B. Extensive Authority Supports Denial of the Cherokee Nation's Motion to Intervene as Untimely

Precedent dictates that the Cherokee Nation's Motion—filed after the close of fact and expert discovery, summary judgment, and a mere two weeks before trial—is untimely. For example, in three separate instances, courts have recently denied motions to intervene by Indian Tribes because the application for intervention was not timely. Tellingly, none of these circumstances rose to the level of improper delay and undue prejudice that the Cherokee Nation asks the Court to allow here.

In *Ute Distrib. Corp. v. Norton*, 43 Fed. App'x. 272 (10th Cir. 2002), the Tenth Circuit affirmed the denial of an untimely motion to intervene as of right by the Timpanogos Tribe, which had (like the Cherokee Nation here) asserted interests as the holder of "aboriginal title to the water rights at issue in the underlying litigation." *Id.* at 275-77. In rejecting the motion to intervene, the Tenth Circuit upheld the district court's finding that the Timpanogos Tribe's motion was untimely because the Tribe knew of its asserted interests (and the Ute Tribe's conflicting claims) for years, but did nothing to previously assert its interests, and delayed in filing a motion to intervene until nearly five years after the lawsuit had been pending. *See id.* at 275-77 ("[Appellees] point out that the Timpanogos Tribe moved to intervene approximately five years into the lawsuit and claim that its intervention at this stage of the lawsuit would prejudice the existing parties by inserting new, substantial issues into the case"). Although the

court subsequently analyzed the other requirements of Rule 24(a), it expressly stated that "our agreement that the motion for intervention was not timely is dispositive of the [] appeal." *Id.* at 277 n.14.

In *United States v. Blaine County*, 37 Fed. App. 276 (9th Cir. 2002), the Ninth Circuit upheld the denial of an untimely motion to intervene as of right filed by representatives of the Belknap Indian Reservation. *See id.* at 277-78. In affirming the district court's holding that the motion was untimely, the court recognized that "discovery had been completed at the time appellants filed their motion," and determined that the Indian representatives "had knowledge of the suit" and "knew they could have met the standard [for intervention] at the time the complaint was filed," yet "fail[ed] to offer sufficient explanation for their delay in filing their motion to intervene." *Id.* at 278.

Finally, in *Canadian St. Regis Band of Mohawk Indians v. New York*, 2005 U.S. Dist. LEXIS 44673 (N.D.N.Y Oct. 11, 2005), the United States District Court for the Northern District of New York affirmed a magistrate's ruling denying the Mohawk Council of Kahnawaike's ("Mohawk Council's") motion to intervene as of right in a land claim action. *See id.* at *2-36. Similar to the present action, the court in *Canadian St. Regis* rejected the motion as untimely based on its determination that each of the relevant sub-factors "weigh[ed] against a finding of timeliness." *Id.* at *35. First, the court determined that the Mohawk Council had actual knowledge of its interest in the litigation, yet improperly delayed in filing the motion to intervene. *See id.* at *9-25. Second, the court ruled that interjection of "complex" collateral matters at this late juncture—including the required determination of the "Mohawk Council's right to the lands at issue under the Treaty of 1796"—would "prejudice the existing parties by expanding the scope of this litigation to include [such] collateral issues." *Id.* at *25-31. Third, the court ruled that the Mohawk Council would not be prejudiced if intervention were denied

because "'the fact that [the Movant] ... will face many significant obstacles if [it] file[s] [its] own lawsuit does not as a matter of law require intervention.' This is especially so considering, as the record shows, that in many respects any barriers which there may be to separate litigation by the Movant have been created by the Movant itself." *Id.* at *31-33 (quoting *In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 199 (2d Cir. 2000). Fourth, the court ruled that the Mohawk Council's unexcused "delay is an unusual circumstance[] which weighs *against* a finding of timeliness here." *Id.* at *33-36 (emphasis in original). The reasoning underlying each of these findings is applicable to this Court's analysis of the Cherokee Nation's motion to intervene.

As these cases make clear, the fact that a movant is an Indian Tribe or has sovereign immunity is not relevant in determining whether the motion to intervene was timely filed or meets Rule 24's other requirements. Indian Tribes, like other litigants who voluntarily subject themselves to the jurisdiction of the federal courts by filing a motion to intervene, must file such a motion in a timely fashion and avoid undue prejudice to the other parties.

The above examples represent just a small sample of instances in which courts have rejected a movant's request for intervention as a matter of right based solely on the fact that the motion was not timely. Motions to intervene are routinely denied on this basis. *See also*, *e.g.*, *In re SEC*, 296 Fed. App'x. at 639-40 (rejecting motion as untimely where movant did not seek to intervene until nearly a year after receiving notice that his interests were at issue). In contrast, the Cherokee Nation does not identify a single instance in which a party has been permitted to intervene mere days before a complex trial that is expected to last for several months. *See* Mot. at 5-6.[5]

[5] In the *State's Motion for Continuance of Trial*, Dkt. No. 2573 at 2 n.1 & Ex. A, Plaintiffs submitted an unsolicited reference to *Johnson v. City of Tulsa*, No. 94-CV-39-H(M) (N.D. Okla. Sept. 10, 2002), but this case is easily distinguishable from the present circumstances. *First*, in finding the motion to intervene to be timely, the court in *Johnson* relied on the fact that "the case

Courts simply will not permit intervention in these circumstances, which clearly violate the Rule 24(a) requirement that a motion to intervene be "timely." Indeed, the briefing on the *Motion to Intervene* itself would not have been complete before the start of trial absent an expedited briefing schedule. It is hard to imagine how such a circumstance could ever be a hallmark of timeliness. Moreover, the few days remaining before trial stand in stark contrast to the years that the Cherokee Nation has known that this trial was coming. Accordingly, Defendants respectfully submit that the Court should therefore deny the Cherokee Nation's motion to intervene as not timely.

C. The existing parties and the Court will be severely prejudiced by the Cherokee Nation's delay in filing the motion to intervene

The existing parties and the Court will suffer severe prejudice in the event the Cherokee Nation's untimely motion to intervene is granted. Trial is set to commence in just a few days, on September 21, 2009. Both the parties and the Court have expended an enormous amount of time

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has not moved forward toward a trial of the issues" since the date that the intervening party, the Fraternal Order of Police (FOP), first "had notice that its interests were different from the [defendants]." *Id.*, at 10-11. Specifically, the court held that:

> [B]ecause the case has been stayed during the entire time the FOP has been on notice, permitting the FOP to intervene today is no different than the Court allowing it to intervene in November 2001. Accordingly, the Court finds that, although the FOP did not intervene when it first had notice that its interests were different from the City's, the FOP's intervention is nevertheless timely since the case has returned to the *status quo ante* of November 2001.

Id. at 11. *Second*, the court found that prejudice to the parties would be minimal because intervention would neither interject additional issues into the proceedings, nor require additional discovery. *See id.* at 11-12. *Third*, the Court found that any settlement or adjudication would not be enforceable absent intervention by the FOP. *See id.* at 13-15. However, the *Johnson* court's reliance on each of these points is wholly inapplicable to the present circumstances, in which (1) the entire litigation has proceeded to its near-conclusion since the Cherokee Nation first had notice that its interests were at issue, *see supra* at 1-9, (2) the parties will be severely prejudiced by the interjection of numerous additional, complex issues relating to the Cherokee Nation's claims and interests, all of which will require extensive discovery, *see supra* at 14-17, and (3) adjudication of the State's remaining claims will be fully enforceable notwithstanding the Cherokee Nation's absence in the proceedings, *see supra* at 7-8.

and resources in pre-trial preparations, deposition designations, exhibit selection and objections, summary judgment motions, *Daubert* motions, summary judgment proceedings, motions in limine and pretrial hearings—much of which will need to be completely reevaluated in the event the Cherokee Nation is permitted to intervene.[6]

Additionally, the untimely intervention will prejudice the parties and the Court by introducing numerous additional, complex issues of law and fact at this late juncture. *See, e.g.*, *Canadian St. Regis Band of Mohawk Indians v. New York*, 2005 U.S. Dist. LEXIS 44673, *25-31 (N.D.N.Y Oct. 11, 2005) (interjecting "complex" collateral matters, such as the "Mohawk Council's right to the lands at issue under the Treaty of 1796" would "prejudice the existing parties by expanding the scope of this litigation to include [such] collateral issues"). Although the "prejudice prong of the timeliness inquiry 'measures prejudice caused by the interveners' *delay*—not by the intervention itself," *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (emphasis added), the Cherokee Nation's delay in asserting its claims will require Defendants to re-open discovery and litigate numerous issues which have already been resolved or mooted. For example, extensive discovery will be required to ascertain the scope of the Cherokee Nation's asserted interests, after which the parties will need to re-litigate the issue of standing to determine the extent of the Cherokee Nation's interests *vis-à-vis* the State and the United Keetoowah Band of Cherokee Indian, which asserts that it—not the Cherokee Nation—is the legally authorized recipient of the treaty promises made to the historic Cherokee Nation.[7]

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[6] Plaintiffs appear more than willing to overlook the prejudice resulting from the Cherokee Nation's delay in order to restore the claims for monetary damages in this case. *See* Dkt. No. 2573. However, this apparent willingness in no way negates the fact that such prejudice does exist.

[7] This is a notable and complex issue which, as the Defendants previously noted, arose after the Rule 19 motion was filed. In sum, there is an ongoing dispute regarding whether the Cherokee Nation of Oklahoma or the United Keetoowah Band of Cherokee Indian ("UKB") are the successors in interest to the historical Cherokee Nation. *See United Keetoowah Band of*

Additional discovery will also be required into the Nation's own contribution to the phosphorus and bacteria content of the waters of the IRW, both to refute the Nation's nuisance claim, *see Walters v. Prairie Oil & Gas Co.*, 204 P. 906, 908 (1922) (holding that where a plaintiff asserting a nuisance claim also contributes to the nuisance, even indirectly, that plaintiff cannot recover without evidence sufficient to permit allocation), and in connection with any cross-claims or counterclaims Defendants might assert against the Nation. Defendants will also need to conduct discovery into the nature of and consideration for the apparent new agreement between the State and the Nation, including whether and how it avoids the problems the Court identified in its July 22, 2009 Order. And of course the Nation has made no initial disclosures and has served no witness or exhibit lists, all of which would require additional discovery once they were served. In short, introducing a whole new plaintiff will necessarily introduce a new set of issues and resulting discovery.

In addition to the new issues that would be created by adding a new plaintiff who has had no part in the case from its inception to trial, allowing the Cherokee Nation to intervene at this late stage will re-introduce a large number of complex legal issues that have been resolved. The issues that would be re-opened include those that were rendered moot by the Court's Rule 19 Order, including whether EPA was correct in stating that CERCLA does not apply to phosphates such as those found in animal manures, whether an entire million-acre watershed can be a CERCLA facility, and whether *New Mexico* preemption applies to the claims in this case. *See*,

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Cherokee Indians v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs (U.S. Dept. of Interior) (June 24, 2009) (attached as Ex. I). Although the Defendants have referred to the historic Cherokee tribal interests as those of the "Cherokee Nation," in fact the parties would be required to litigate whether the modern Cherokee Nation or the UKB is the tribal government with authority over the IRW's natural resources and the other incidents of tribal sovereignty. This dispute also raises the question, of course, of whether the UKB is an indispensable party to any damages claims under the analysis in the Court's July 22, 2009 Order. While Attorney General Hammons represents the interests of the Cherokee Nation, she does not represent the interests of the UKB which has its own, separate tribal government.

e.g., *Defendants' Joint Motion for Summary Judgment on Counts 1 And 2 Of The Second Amended Complaint*, Dkt. No. 1872; *Defendants' Motion for Partial Summary Judgment on Plaintiff's Damages Claims Preempted or Displaced by CERCLA*, Dkt. No. 2031. These complex issues are in addition to numerous *Daubert* motions, motions *in limine* and other matters which the Court found moot in the current litigation but which would need to be addressed if the *Motion to Intervene* were granted. *See, e.g.*, *Motion to Strike Supplemental Report of David R. Payne*, Dkt. No. 1992; *Motion* in *Limine to Exclude Defendants' Expert Report Entitled "Evaluation of Hypothetical Remediation Strategy Presented in Stratus Contingent Value Study Illinois River Watershed*," Dkt. No. 2242; *Defendants' Motion to Exclude the Testimony of Plaintiffs' Proffered Punitive Damages Expert David R. Payne*; Dkt. No. 2263; *Motion in Limine to Exclude Portions of Defendants' Expert Report of William H. Desvousges and Gordon C. Rausser*, Dkt. No. 2270; *Motion to Exclude Testimony of the Stratus Consulting Experts*, Dkt. No. 2272; *Motion to Strike Portions of the Errata Sheet of Plaintiffs' Proffered Punitive Damage Expert David R. Payne*, Dkt. No. 2355; *Motion to Strike Untimely Supplemental Report and Considered Materials of Defendants Damages Experts William H. Desvousges and Gordon C. Rausser*, Dkt. No. 2354; *Motion to Strike Document(s)*, Dkt. No. 2339.

D. The Cherokee Nation will not be prejudiced by denial of its motion to intervene

In contrast, the Cherokee Nation will suffer no prejudice if its untimely attempt to intervene is denied. The Court has already dismissed the claims in this litigation that might impair or impede the Cherokee Nation's protection of its interests in the IRW. *See* Order at 22-

23.[8] Accordingly, the Cherokee Nation can bring those claims in its own lawsuit if it wishes, and proceed in the ordinary course. The State can join the Cherokee Nation in that litigation if it chooses. The Court notified the Cherokee Nation and the State of this option in its July 22, 2008 order. *See* Order at 20.[9]

Although the current case does not contain any of the claims the Cherokee Nation seeks to assert, the *Motion to Intervene* argues that the Cherokee Nation will be prejudiced in several respects if intervention is denied. First, the motion asserts that intervention should be granted because the Nation did not know that the Court would choose to separate the Cherokee Nation's potential claims from the State's trial. *See* Mot. at 6. With no damage claims pending for immediate resolution, the *Motion to Intervene* asserts that the Cherokee Nation has an interest in asserting "CERCLA and damage claims" in the present trial in order to provide "funding [for] the restoration that the IRW needs." *Id.*

This argument is nonsensical. The Court separated from the trial the very claims that the Cherokee Nation seeks to assert. Accordingly, the Nation need not worry that the State is intruding upon the Nation's claims as trustee over the IRW's resources.

With its claims preserved from interference by the State, this argument boils down to timing. The *Motion to Intervene* seeks to resolve the Cherokee Nation's claims without the normal discovery and other proceedings associated with litigation. The Cherokee Nation asserted its CERCLA and federal common law claims within the past week, and it would like a trial on those claims next week or, at the maximum, within a few months. This request is

[8] Indeed, the Cherokee Nation do not reference any authority that would permit a party to intervene solely for the purpose of resuscitating claims which the Court has already dismissed.

[9] The State or Cherokee Nation may argue that Rule 19 was intended to prevent piecemeal litigation, but such an argument would be misplaced. Rule 19 addresses the risk of multiple, double or inconsistent obligations. *See* Fed. R. Civ. P. 19. Because the Court has separated the damages claims the Cherokee Nation seeks to bring, there is no risk of these inconsistent obligations if the trial proceeds.

unreasonable. The Nation has had no involvement in this case, and thus has invested no time and resources in preparing for trial. In contrast, the Defendants and the Court have worked for years to prepare for trial on certain claims, as those claims have been narrowed through discovery and motions. Based on its long experience, this Court is aware of the enormous investment of time and resources that the parties and the Court incur in the months and weeks before trial, not to mention the disruptions to the client's ongoing business and the schedules of witnesses. Because of the scope of this trial, those burdens are magnified several times over. The *Motion to Intervene* attempts to invoke the judicial system's interest in conducting a trial "by wholes" to avoid wasted resources, but the burden associated with requiring the Cherokee Nation to bring their claims in the normal course is far outweighed by the burden on the system of preparing for an immediate trial on a specific set of claims, only to set those claims aside only a few days before opening statements and re-shape the trial. As the First Circuit has stated, "the purpose of the basic requirement that the application to intervene be timely is to prevent last minute disruption of painstaking work by the parties and the court." *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980). Moreover, the intervention of the Nation would not permit the Court to try the "whole" of the claims here in any event. As the Court is aware, the Defendants' claims for both CERCLA and common law contribution against responsible third parties have been severed from the present case and trial (see Dkt. No. 916), and those related cases will remain to be resolved regardless of whether the Nation participates in the impending trial.

Courts have repeatedly recognized that "'the fact that [the Movant] ... will face many significant obstacles if [it] file[s] [its] own lawsuit does not as a matter of law require intervention.' This is especially so considering, as the record shows, that in many respects any barriers which there may be to separate litigation by the Movant have been created by the Movant itself." *Canadian St. Regis Band of Mohawk Indians*, 2005 U.S. Dist. LEXIS 44673, at

*31-33 (quoting *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 199 (2d Cir. 2000). Plaintiffs and the Cherokee Nation could have easily avoided the necessity of a separate litigation by requesting joinder or seeking to intervene at the outset of this litigation. Their knowing (and strategic) refusal to do so requires the Court to discount any potential hardships that may result from such separate litigation.

Furthermore, the Cherokee Nation is wrong in asserting that the "prejudice to the Nation if not allowed to intervene is substantial [because] … an important resource will continue to diminish in quality and economic value." Mot. at 6. This boils down to an argument that the Cherokee Nation should be allowed to get an immediate injunction to prevent future pollution. But that is exactly what the State seeks in the upcoming trial. Defendants assert that the natural resources of the IRW are not being injured by the longstanding practice of using poultry litter as a fertilizer and soil amendment. But that issue will shortly be resolved by this Court. In contrast, the monetary claims that the Cherokee Nation seek to re-introduce into this litigation are designed solely to recover monetary damages for past harm—a substantial percentage of which the State has contracted to give to private counsel as a contingency fee. *See* Order at 13.

E. The unusual circumstances of the Cherokee Nation's filing a mere two weeks prior to the start of trial weigh in favor of denial

There are no unusual circumstances to excuse the Cherokee Nation's conscious failure to intervene during the past four-and-a-half years of this litigation. Courts have recognized that, in and of itself, such a "delay is an unusual circumstance[] that weighs *against* a finding of timeliness." *Canadian St. Regis Band of Mohawk Indians*, 2005 U.S. Dist. LEXIS 44673, at *33-36 (emphasis in original). Further, the prejudice that the Court, the parties and the public will suffer as a result of the significant delay is both extreme and unusual. To this end, it is noteworthy that Plaintiffs' request for a continuance flatly contradicts the Attorney General's

repeated argument that the "imminent and substantial threat" to the public requires immediate action by the Court. *See, e.g.*, P.I.T. at 35:23-36:23 (Feb. 19, 2008) (Ex. J).

II. Plaintiffs' Motion for a Continuance Should Be Denied

The *State's Motion for Continuance*, Dkt. No. 2573 (Sept. 3, 2009), should be denied because it presumes that the Court will permit the Cherokee Nation to intervene in the twelfth hour. For the reasons set forth above, the Cherokee Nation's motion to intervene is untimely and should be rejected by this Court—thereby mooting Plaintiffs' motion for continuance.

Nevertheless, even if the Court were to grant the Cherokee Nation's motion to intervene, Plaintiffs' motion for a continuance of 120 days (January 2010) grossly underestimates the amount of discovery, time and resources that will be needed to properly evaluate the Cherokee Nation's asserted claims prior to trial. As detailed *supra*, extensive discovery and briefing will be required to adjudicate the numerous additional, complex issues of law and fact presented by virtue of the Cherokee Nation's separate claims and interests. *See supra* at 17-20. This discovery would need to be undertaken without the State seeking to introduce new sampling, expert analysis, exhibits or evidence, which would only cause the case to enter a whole new round of discovery as if it had just been filed. In addition, the calendars of defense counsel, defense witnesses and perhaps the calendar of the Court are not so malleable that a several month long trial can simply be penciled in a mere four months from now as the State suggests. *See* State's Motion for Continuance of Trial, Dkt. No. 2573. At Plaintiffs' demand, the September 21 trial date has been on the calendar for more than a year. Defense counsel, defense witnesses and this Court have postponed and delayed other important business and cases in order to accommodate Plaintiffs' demands for a September 21 trial date with the expectation that such matters can be attended to once this trial concludes in October or November of 2009. Stated simply, several of the principal trial attorneys in this case have informed other federal and state

courts that major trials in which they are involved could not be scheduled in the fall of 2009 (out of deference to this trial date), so those matters are now scheduled for January-March 2010. To suggest that defense counsel, defense witnesses and the Court should now postpone or delay those matters again while the parties and the Court devote the next four months to additional discovery and motion practice before proceeding with a several month trial beginning in January 2010 is simply unreasonable and unrealistic. Defendants request that the continuance be denied and that this case proceed to trial beginning on September 21, 2009 as scheduled. However, in the event the State's motion for continuance is granted, Defendants request that the trial of this matter be postponed for at least one year to allow ample time for discovery and motion practice relative to the Cherokee Nation's claims and for the Court and defense counsel to attend to other important matters that have been neglected or postponed awaiting the completion of the trial.

CONCLUSION

For the foregoing reasons, the Court should deny the Cherokee Nation's untimely motion to intervene in this matter, and the State's related motion for continuance of the trial date.

Respectfully submitted,

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